80-1055

No. ———

Supreme Court, U. S.
FILED
DEC 27 1980
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

———

WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, deceased minor, WILLIAM T. REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Appellants,

v.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION dba THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Appellees.

———

ON APPEAL FROM THE COURT OF APPEALS OF THE FIRST APPELLATE DISTRICT OF OHIO

———

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. ARE AMENDMENTS TO A STATE STATUTE OF LIMITATIONS WHICH:

   A. Eliminate legal disabilities of minority and incompetency for the exclusive benefit of a special class;

   B. Eliminate pre-existing accrued causes of action by retroactive application;

   C. Differentiate between the rights of children under the age of 10 by permitting a child under said age until his 14th birthday to commence legal action but a child over 10 only one year to do so when in all other matters statutes of limitations are tolled to the majority age of 18;

   D. Are so vague that individuals of common intelligence must guess as to its meaning and differ as to its application;

   E. Grant exclusive and special privileges and immunities to hospitals and physicians by eliminating the legally recognized disabilities of incompetency and minority; and

   F. Destroy the inseparability of causes of actions which is otherwise legally recognized

in violation of the Fifth and Fourteenth Amendments of the United States Constitution by denying equal protection under the law, equal access to the courts, and due process of law, especially when only a special class (physicians and hospitals) and no other class of professional tortfeasors or legal wrongdoers can avail themselves of the privileges and immunities contained within the statutory amendments?

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No. ———

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, deceased minor, WILLIAM T. REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Appellants,

v.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION dba THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Appellees.

———

ON APPEAL FROM THE COURT OF APPEALS OF THE FIRST APPELLATE DISTRICT OF OHIO

———

JURISDICTIONAL STATEMENT

———

OPINIONS BELOW

All pertinent opinions of the Courts below, as well as the extension for time to file this document in the United States Supreme Court, are contained in Appendices A through D. These opinions and orders of the Court include the extension of time to file in the Supreme Court of the United States, the November 26, 1980 Entry of the Supreme Court of Ohio, denying second request for rehearing, the Supreme Court of Ohio decision in *Vance* v. *St. Vincent Hospital,* 64 O.St. 2d 36

(1980), the July 30, 1980 Entry of the Supreme Court of the State of Ohio, denying rehearing, the June 27, 1980 Entry of the Supreme Court of Ohio, dismissing the Appeal sua sponte, the June 27, 1980 Entry of the Supreme Court of Ohio, overruling the Motion To Certify the Record, Entries of the Supreme Court of Ohio of May 9, 1980, granting leave to file amicus curiae briefs on behalf of the Ohio Academy of Trial Lawyers and Children's Hospital Medical Center, et al., in *Vance, et al.* v. *St. Vincent Hospital Medical Center, et al., supra,* Entry of the Supreme Court of Ohio of February 22, 1980, granting Motion To Certify the Record in *Vance, et al.* v. *St. Vincent Hospital Medical Center, et al., supra,* Judgment Entry of March 19, 1980 of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio, Opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio, issued on March 19, 1980, order of substitution of Plaintiffs' representative, January 5, 1979, and Judgment Entry of the trial court on December 8, 1978. These court orders and decisions, except for the decision in *Vance, et al.* v. *St. Vincent Hospital Medical Center, et al.,* 64 O.St. 36 (1980), are unpublished, and all are contained in the appendix.

GROUNDS FOR JURISDICTION

Jurisdiction of this court arises under 28 U.S.C. § 1257(2) and the Fifth and Fourteenth Amendments to the United States Constitution. In question is the constitutionality of § 2305.11 of the Ohio Revised Code, as amended July 28, 1975. The First District Court of Appeals of Ohio upheld the validity, application and constitutionality of this statute on March 19, 1980, and it is this opinion upon which this appeal is based. The Supreme Court of Ohio denied certification and dismissed the appeal on June 27, 1980 and denied rehearing on two separate occasions (July 30, 1980 and November 26, 1980). This jurisdictional statement is being filed within the extension granted for filing by this Court. Pursuant to 28 U.S.C. § 2403

(B) service has been made upon the Attorney General of the State of Ohio. Further, the application of this statute which effectively eliminates the otherwise legally recognized disabilities of incompetency, minority, inseparability of claims, and retroactively denies accrued rights to redress creates a second class citizenry without equal protection, equal access to the courts, and due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant Federal Constitutional provisions are Amendments Five and Fourteen of the United States Constitution. Additionally, Appellants contend that the interpretation given to § 2305.11 of the Ohio Revised Code as amended on July 28, 1975, by the First District Court of Appeals is in violation of the due process and equal protection guarantees of the United States Constitution and is also in violation of Sections 3109.01, 1.11, 1.47, 1.48, 1.49, 1.58, of the Ohio Revised Code, Article I, § 2, Article I, § 16, Article II, § 26 and § 28, Article IV, § 2(B)(2)(a)(iii), (d) of the Ohio Constitution and Rules 17(B) and 19.1(A)(3) of the Ohio Rules of Civil Procedure. These statutory provisions are reprinted in Appendix E.

STATEMENT OF THE CASE

A. Statement of the Facts

At birth, on July 31, 1962, Scott Kendall Rembold suffered severe brain damage caused by the negligence of the Defendants. This damage resulted in cerebral palsy in all four extremities, the inability to speak or to write, and severe growth retardation. Throughout his 16 years of life he required the constant care of an infant, was unable to crawl, creep or walk, was incapable of being toilet trained, unable to grasp or to hold objects or to chew food, required bottle feeding, and only achieved weight of 23 pounds and measured 40 inches in height.

At the time of Scott's birth, the age of majority in Ohio was 21 and was later changed to 18.[1] Under § 2305.16 O.R.C., legal disabilities of minority and incompetency tolled any statute of limitations until such legal disability was removed. Additionally, under that statute, individuals whose claims were inseparable to those of an individual who had a legal disability were also tolled.[2] On January 25, 1978, suit was commenced on behalf of Scott and his parents against the Appellees for the medical negligence which resulted in his injuries. During the pendency of this action, Scott died intestate and was substituted by his father, William T. Rembold, Jr., as the administrator of his estate.

B. Statement of the Legal Proceedings and Argument

Following the filing of the original complaint, Dr. John Fleming and the hospital, Appellees, filed Motions To Dismiss and/or Motions For Summary Judgment and/or Motions On The Pleadings, contending that the amendments to § 2305.11 barred Appellants' causes of action. The amended statute in question (§ 2305.11 O.R.C., effective July 28, 1975), which formerly permitted a one-year statute of limitations in medical malpractice cases *after* the legal disabilities contained in § 2305.16 (minority and incompetency) were removed, had been amended to read as follows:

> ". . . (A)n action for . . . malpractice, including an action for malpractice against a physician, podiatrist, or hospital, . . . shall be brought within one year after the cause thereof accrued . . .
>
> "If a written notice, prior to the expiration of time contained in this division, is given to any *person in a medical* claim that an individual is presently considering bringing

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[1] § 3109.01 O.R.C., *Cook* v. *Matvejs*, 56 O.St. 2d 243 (1978).

[2] *Id.*, also see Rule 19.1(A)(3) of the Ohio Rules of Civil Procedure, and the U.S. 6th Cir. Ct. of Appeals in *Gayle* v. *Fening, M.D., et al.* (C-76-140 (1978)) has held that the age of majority in medical malpractice matters is eighteen.

an action against that person relating to professional services provided to that individual, *then an action by that individual against that person may be commenced at any time within 180 days after that notice is given.* (B) In no event shall any medical claim against a physician, podiatrist, or hospital be brought more *than four years after the act* or omission constituting the *alleged malpractice occurred.* The limitations in this section for filing such a malpractice action against a physician, *podiatrist, or hospital applied to all persons regardless of legal disability and notwithstanding Section 2305.16 of the Revised Code, provided that a minor who has not attained his 10th birthday shall have until his 14th birthday in which to file an action for malpractice against a physician or hospital . . .*" (Emphasis added)

The Appellants at this first stage in the trial court process attacked the constitutionality of this amended statute and its application to this case. The trial court, however, sustained the Motions of the Appellees.

Immediate and timely appeal was taken to the Court of Appeals for the First Appellate District, Hamilton County, Ohio. Again, the Appellants attacked the constitutionality of amended § 2305.11 O.R.C. and contended that it was not only being retroactively applied but was also in violation of the Federal and Ohio Constitutions[3] and Ohio statutory law. Further, the amendments to the statute lacked single interpretation requiring it to be declared invalid and unconstitutional because of vagueness. The Court of Appeals for the First Appellate District, Hamilton County, Ohio, on March 19, 1980, set forth an interpretation of the amended statute and upheld its constitutionality.

On February 22, 1980, the Supreme Court of Ohio granted certification in the case of *Vance* v. *St. Vincent Hospital and Medical Center* (Case No. 80-8). The *Vance* case questioned the applicability of the statute to minors who were over the

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[3] 5th & 14th Amendments — U.S. Const.; § 1.48, § 1.11, § 1.47, § 1.58 of the Ohio Revised Code; Art. I, § 2, § 16, Art. II, § 26, § 28 of the Ohio Constitution; *Gregory* v. *Flowers*, 290 N.E. 2d 181 (1972).

age of 10. The *Vance* case, however, *did not* attack the constitutionality of the statute. Appellants timely filed their Notice of Appeal to the Supreme Court of Ohio, and their Memorandum In Support of Jurisdiction with request that there be consolidation for briefing and oral argument purposes with the *Vance* case. On May 9, 1980, the Supreme Court of Ohio granted permission to the Ohio Academy of Trial Lawyers and to Children's Hospital Medical Center, et al., to file amicus curiae briefs in the *Vance* case. However, the Supreme Court of Ohio, on June 27, 1980, denied Appellants' Motion To Certify the Record and sua sponte dismissed their appeal. A request for rehearing was timely filed with the Supreme Court of the State of Ohio, which included an Affidavit (which had already been supported by letter to the Supreme Court of Ohio) executed by the attorney representing the Appellants in *Vance,* citing the similarity of issues and the necessity for certification and consolidation of these cases. Additionally, another unreported Court of Appeals' Decision[4] from a different Court of Appeals was set forth, in which a different interpretation as to the applicability and constitutionality of the amended § 2305.11 O.R.C. was given than the Appellate Court decisions in *Vance* and in the case at bar. On July 30, 1980, the Supreme Court of the State of Ohio denied rehearing to the Appellants. A second Motion for Rehearing and for consolidation was immediately filed. Without action being taken on that Motion, oral argument took place in the Supreme Court of Ohio in *Vance.* An extension of time to file this jurisdictional statement in the Supreme Court of the United States was requested by Appellants with the hope that the Supreme Court of Ohio would review the constitutional questions raised in Appellants' case when the Supreme Court decided *Vance.* This request for extension of time was granted until December 27, 1980. The Supreme

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[4] *Quinn* v. *Lake County Memorial Hospitals,* 11th Dist., CA, Ohio (1979). The first court in California to review a similar statute struck it down as denial of equal protection and due process. (*Paxton* v. *Pund, et al.* (Sup.Ct., Calif. #420199 (1979)).

Court of Ohio, on November 26, 1980, denied Appellants' second Motion for Rehearing. At the same time the Supreme Court issued the *Vance* decision (64 O.St. 2d 36 (1980)), in which the Court determined the age of majority based upon amended § 2305.11 O.R.C. in medical malpractice cases to be the age of 10 unless a child was under 10, then it was to be the age of 14. The Court in *Vance, supra,* stated that the constitutional issues were not before it in *Vance* and, therefore, did *not* rule on the constitutionality of this statute.

It has consistently been Appellants' contention that § 2305.-11 O.R.C., as amended, is unconstitutional[5] as it is a denial of equal protection under the law, a limitation upon equal access to the courts, constitutionally unjustified under the circumstances, and is a constitutionally forbidden retroactive application of the law; all of which results in a taking of constitutionally guaranteed rights without due process of law. Under Ohio law, a minor cannot enter into a contractual relationship until he is at least the age of 18.[6] Additionally, a minor cannot bring an action in his own behalf until he has reached the majority age of 18.[7] No rational basis exists in either medicine or law as to why the Legislature determined that a child 9 years and 364 days old should have until his 14th birthday to commence suit but a hypothetical twin who is born after midnight (and is thus 9 years and 365 days old) should only have until his 11th birthday to commence legal action in a medical negligence matter. Why should the legal disabilities of minority and incompetency as found in § 2305.16 O.R.C. be removed in medical negligence matters and not in any other circumstance involving the negligent tort feasors? If an individual who is legally incompetent because of minority and/or incompetency to bring an action on his own behalf and in only medical negligence matters has the legal disability

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[5] Copies of Appellants' Assignments of Errors and Proposition of Law filed in the lower courts are attached.

[6] § 3109.01 O.R.C.

[7] Rule 17(B) Ohio Rules of Civil Procedure.

removed but remains legally incapable of bringing an action on his own behalf, equal access to the courts has been effectively denied. The rationale behind the age of majority is based upon a determination of physical and mental maturity. The arbitrary selection of 10 years as a cutting off point has no rational foundation in regard to the physiological growth patterns of a minor. The purpose of enacting an age of majority was to recognize the need to protect the rights of minors. The amendments to § 2305.11 O.R.C., effective July 28, 1975, destroys that protection in medical negligence cases. If the purpose of the enactment of these amendments was to shorten the exposure to suit of physicians and hospitals, that purpose has *not* been achieved by these amendments. If a child not yet in being or one second old has until he is 14, but a child already in being and over the age of 10 only has one year to commence suit the opposite result occurs. If the statute was really intended to shorten the exposure period, then it should have shortened the period to bring suit by the youngest child, not by the older one. The amended statute and the Court decisions in *Rembold* and in *Vance* are totally silent as to who would be responsible for bringing causes of action on behalf of the individuals whose legal disabilities have now been eliminated in actions arising out of medical negligence.

The statute in question speaks of an extension period of 180 days if written notice has been given.[8] However, it does not state whether a minor over 10 or under 10, or over 14 or under 14, has a right to avail himself of that 180-day extension period. If a child under 10 has until he is 14, why should a child over 10 not have at least up until his 14th birthday to file his cause of action?

Under the laws of the State of Ohio, it is presumed that when a statute is enacted, that it must be in compliance with the Constitution of the State of Ohio and of the United

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[8] § 2305.11(A) O.R.C. as amended July 28, 1975. In case at bar written notice had been given and suit was commenced within 180 days of said notice.

States.[9] Moreover, it is in violation of statutory and constitutional rights for statutes to be applied retroactively to extinguish accrued causes of action.[10] The causes of action in this case were accrued at the time of birth of the minor and were tolled until the age of majority.[11] At the time of passage of the amendments to § 2305.11 O.R.C. the minor was over the age of 10 but under the age of 14. The application of § 2305.11 O.R.C., effective July 28, 1975, as amended, to the case at bar, was retroactive and, thus, unconstitutional.

The amended statute in question is vague and lacks single interpretation as to the one-year statute of limitations and how one would invoke the possible four-year grace period which it mentions.[12] The vagueness of § 2305.11 O.R.C., as amended, necessitates that it be considered unconstitutional on its face. A statute is considered vague when individuals of common intelligence must guess at its meaning and differ as to its application. *McNea* v. *Garey*, 434 F.Supp. 95 (N.D. Ohio, 1978), *U.S.* v. *Corbin Farm Services*, 449 F.Supp. 510 (E.D. Calif., 1978), *Sovereign News Co.* v. *Falke*, 448 F.Supp. 305 (N.D. Ohio, 1977). Not only can the general public not arrive at a single interpretation of this amended statute but the courts which have been called upon to interpret this statute in light of its constitutionality and applicability have also differed in their rulings.

The amended statute in question by eliminating the otherwise legally recognized disabilities of minority and incompetency for physicians and hospitals but not for other individuals

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[9] § 1.47 O.R.C.

[10] *Supra*, at 3.

[11] § 2035.16, § 3109.01 O.R.C., and the former § 2305.11 before the July, 1975 amendments.

[12] Ohio has long recognized the tolling indefinitely of the statute of limitations in medical malpractice cases until discovery of foreign objects, and/or the termination of the doctor/patient relationship, *Melnyk* v. *Cleveland Clinic*, 32 Ohio St. 2d 198 (1972), *Gillette* v. *Tucker*, 67 Ohio St. 100 (1902), *Vance, supra.*

covered by that same statute of limitations (i.e., architects, lawyers, podiatrists, engineers, and other professionally negligent tortfeasors) has created special privileges and immunities which is in violation of the Ohio and Federal Constitutions and a denial of equal protection and uniformity under the law.[13] For a classification not to be considered discriminatory and/or arbitrary and/or capricious, it must have some legitimate state interest. *Jiminez* v. *Weinberg*, 417 U.S. 628 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Primes* v. *Tyler*, 43 O.St. 2d 195 (1975), amendments V and XIV of the United States Constitution, and Article I, § 2 of the Ohio Constitution. The statute in question and the opinions of the courts below in regard to its constitutionality and in its applicability warrant constitutional scrutiny by this Court. The claims of the parents are inseparable to those of the minor[14] and also warrant constitutional protection and review.

QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Numerous courts in Ohio have had to interpret various segments of the Ohio Medical Malpractice Law, of which the amendments to § 2305.11, effective July 28, 1975, are a part. Several of these courts have determined that sections of this Act cannot be applied retroactively.[15] Moreover, the Sixth Circuit Court of Appeals has determined after the enactments of the amendments to § 2305.11 O.R.C., which are in question herein, that the appropriate age of majority is 18 in medical malpractice cases in Ohio.[16] These decisions are in direct con-

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[13] Art. II, § 26 Ohio Constitution, § 1.48 O.R.C., 5th and 14th Amendments — U.S. Constitution.

[14] § 2305.16 O.R.C., Rule 19.1(A)(3) of the Ohio Rules of Civil Procedure.

[15] *Wade* v. *Lynn*, 181 F. Supp. 361 (N.D., Ohio 1960); *Young* v. *Alberts*, 342 N.E. 2d 700 (1975); *Walsh* v. *Jellen*, 51 O. Misc. 97 (1977).

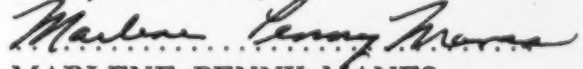
[16] *Gayle* v. *Fening*, *supra*.

tradiction to the applicability of the statute and the upholding of its constitutionality by the Supreme Court of Ohio in *Vance, supra,* and the First District Court of Appeals in this case. Other Ohio appellate courts have had to interpret and apply § 2305.11 as amended, O.R.C. and have done so without uniformity.

The application of this statute is arbitrary and capricious, and discriminates against individuals who in all other matters are considered legally incompetent. The discriminatory basis of this statute has no sound justification in either medicine or law for the age differentiations between minors and the denial in only medical negligence cases of otherwise recognized legal incompetencies. The acceptance and interpretations of this statute which are challenged in this case effectively deny a large segment of the population in Ohio equal protection under the law, equal access to the courts, and the right to redress without due process of law. A burden has been placed on those individuals who are least able and legally incapable of representing themselves. Section 2305.11, as amended, effective July 28, 1975, O.R.C. warrants severe constitutional scrutiny and review by the Highest Court of this land.

Wherefore, Appellants request plenary consideration, with permission to file briefs and to have oral argument for determination by this Court of the constitutionality of the statute in question and its applicability. It is appellant's position that the application of the amended § 2305.11 O.R.C., effective July 28, 1975, is repugnant to the Constitution of the United States. 28 U.S.C. § 1257(2).

Respectfully submitted,



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DATED: December 26, 1980.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Jurisdictional Statement with Appendices were served upon each of the following: Clement DeMichelis, Attorney at Law, 711 Gwynne Building, Cincinnati, Ohio 45202, and Frederick Brockmeier, Attorney at Law, 907 Central Trust Tower, Cincinnati, Ohio 45202, as the only attorneys of record for Defendants-Appellees, and William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by placing the same in U. S. Mail, postage prepaid, this 26th day of December, 1980.

Marlene Penny Manes

MARLENE PENNY MANES
Member of the Supreme Court Bar

APPENDIX A – OPINION OF COURT FROM WHICH APPEAL IS TAKEN

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-790011

SCOTT KENDALL REMBOLD, a minor by his parents and next friend, WILLIAM THEODORE REMBOLD, JR., WILLIAM THEODORE REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Plaintiffs-Appellants,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, d/b/a THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Defendants-Appellees.

OPINION

(Filed March 19, 1980)

APPEAL FROM THE COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO

Mr. James R. Hartke and Ms. Marlene Penny Manes, 914 Main Street, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

Mr. Clement DeMichelis, 711 Gwynne Building, Cincinnati, Ohio 45202, for The Christ Hospital, Defendant-Appellee,

Mr. Frederick Brockmeier, 907 Central Trust Tower, Cincinnati, Ohio 45202, for John Fleming, M.D., Defendant-Appellee.

PALMER, J.

This appeal involves a medical malpractice action arising out of alleged acts of negligence of the defendant physicians and hospital in connection with the delivery of plaintiff-appellant, Nancy C. Rembold, wife of plaintiff-appellant, William T. Rembold, of an infant, Scott Kendall Rembold, on July 31, 1962. The infant, who died in August, 1978, during the trial court proceedings,[1] suffered severe brain damage caused, it is alleged, by the negligent failure of the defendants to recognize the symptoms of distress and to administer oxygen and undertake other emergency procedures in sufficient time to prevent or ameliorate the damage. The child suffered gross incapacities, with cerebral palsy involving all extremities, was unable during his 16-year life span to speak or write, suffered severe growth retardation, and continued throughout the balance of his life to require the care given an infant. Two causes of action were pleaded, one on behalf of the child and the second by the parents for loss of services, medical and other expenses, and "emotional distress." Defendants-appellees filed motions to dismiss and motions for judgment on the pleadings, raising the bar of R.C. 2305.11,[2] the ap-

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[1] The infant's father, William T. Rembold, administrator of his estate, was substituted for the decedent by entry of January 5, 1979.

[2] The relevant sections of R.C. 2305.11, to which reference will be made throughout this decision, are as follows:

> (A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, *or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital,* or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid

plicable statute of limitations. After extensive memoranda and arguments, the trial court granted the motion to dismiss and entered judgment for defendants, the Christ Hospital and John G. Fleming, M.D., appellees herein. Appeal was timely brought, raising two assignments of error for review.

I.

In the second and less complex of appellants' assignments of error, the dismissal of the parents' cause of action through application of R.C. 2305.09, the four year statute of limitations, is attacked. The parents argue that their cause of action was preserved by R.C. 2305.16, which provides in relevant part that:

> Unless otherwise specially provided in sections 2306.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections . . . is, at the time the cause of action accrues, within the age of minority, of

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overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital. [Emphasis added.]

> unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed. *When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.* . . . [Emphasis added.]

The parents argue that since the child was under an obvious disability which tolled the running of the statute, they, whose interests are "joint and inseparable" with his, must be accorded the benefit of the savings clause and, thus, had one year to commence their action after the disability of their child was removed. Putting aside until Part II of this decision an examination of the major premise of this syllogism, *viz.*, that, as to the child, the limitation was indeed tolled at the time suit was commenced, it is nevertheless clear that the minor premise, *viz.*, that the interests of the parents are joint and inseparable from that of the child, is faulty and must fall, along with the conclusion.

Thus, an action for loss of services and medical expenses has been held to be *separate and distinct* from that of the party who suffered the personal injuries, so that the bar of the statute of limitations as to the latter does not necessarily bar the former:

> "The fundamental reasons for the conclusions reached . . . are that the causes of action are not the same, that the parties are not the same, and that there is no privity between the husband and the wife in the assertion of their respective demands.

Kraut v. *Cleveland Ry. Co.* (1936), 132 Ohio St. 125, 126-127, 5 N.E.2d 324, 325. The action, not being derivative in nature, is not controlled by the limitation placed on the underlying tort, but rather is governed by the statute of limitations dealing with injuries not arising on contract nor otherwise enumerated, *i.e.*, G.C. 11224(.4), now R.C. 2305.09(D). *Kraut, supra at* 130, 5 N.E.2d at 326.

This rule has subsequently been applied in two more re-

cent decisions of the Supreme Court, *Corpman* v. *Boyer* (1960), 171 Ohio St. 233, 169 N.E.2d 14, and *Amer* v. *Akron City Hospital* (1976), 47 Ohio St. 2d 85, 351 N.E.2d 479, both involving actions by one spouse for loss of consortium, loss of services, and medical expenses incurred in behalf of the other, and both arising from medical malpractice. In both cases, the action by the spouse for consequential damage for loss of services, consortium, etc., was held to be separate and distinct from that for medical malpractice, and was governed by the four year limitation of R.C. 2305.09 (D), rather than by the one-year limitation period of R.C. 2305.11. The conclusion one derives from these authorities is inescapable: that the second cause of action of the appellants, mother and father, for loss of services, expenses, etc., resulting from medical malpractice suffered by their son, is not "joint and inseparable" from the malpractice action, within the meaning of R.C. 2305.16, but is a separate and distinct action governed by its own four year statute of limitations in R.C. 2305.09(D), and that any disability of the child, which would toll the statute as to him, would not therefore inure to the benefit of the parents.[3]

It follows that, since the action of the parents for loss of services, expenses, etc., was filed more than four years after the cause of action accrued, the trial court did not err in holding that the action of the parents was barred by R.C. 2305.09. The second assignment of error is overruled.

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[3] Appellants argue that the complaining parties in *Corpman* were both adults (as they were in *Amer* and *Kraut*, for that matter), and that this somehow ought to distinguish the cases from the instant case, where one of the injured parties was an infant who could not have enforced his rights by himself. No authority is cited in support of this, and no reason occurs to us why this factual distinction should make any difference in the rule.

II.

The remaining question is raised by appellants' first assignment of error, challenging the dismissal of the infant's cause of action for medical malpractice because of the limitations bar of R.C. 2305.11. Appellants argue that the statute, as amended effective July 28, 1975, is unconstitutional and therefore ineffective to foreclose application of R.C. 2305.16, which otherwise tolled the statute of limitations during disability. Thus, argue appellants, the running of time should have been found to have been stayed until both disabilities, minority and unsound mind, were removed. Since the latter disability was alleged to be permanent, the disability would presumably have lasted the life span of the individual; and further (the argument goes), since suit was commenced during the term of both disabilities, it was timely filed – at least as to the child.

This argument by the appellants is quite clearly the only one to be made which could preserve the child's cause of action. In any other circumstance permitting R.C. 2305.11 (B) to stand, the instant action obviously would have been commenced beyond the time its provisions permit. *See* note 2 *infra* for the text of R.C. 2305.11(B).

The relevant times and events to be borne in mind are as follows: (i) the infant was born on July 31, 1962, the date the acts or omissions constituting the alleged malpractice occurred; (ii) R.C. 2305.11 was amended by the inclusion of, *inter alia,* subsection (B), effective July 28, 1975; (iii) the fourteenth birthday of the child occurred on July 31, 1976; and, (iv) suit was commenced on January 25, 1978, approximately eighteen months after the child attained his fourteenth birthday. At the time of the acts or omissions of malpractice, the infant thus had the benefit of R.C. 2305.16, tolling the running of any limitation during his twin disabilities of infancy and incompetency. With the effective passage of R.C. 2305.11(B) on July 28, 1975, however, this period of grace would have become subject to an overall limitation of four

years after the occurrence of the acts or omissions constituting the malpractice, so that suit would have had to be commenced on or before July 30, 1966, except that the infant, not having attained his tenth birthday, had until his fourteenth birthday to commence the action, *i.e.*, on or before July 31, 1976. In effect, the representatives of the child had a period of one year and 3 days, from the effective date of the amendment to R.C. 2305.11 on July 28, 1975, until his fourteenth birthday on July 31, 1976, in which to commence the action. This was not done until January 25, 1978, well beyond the limitation period.[4] The cause of action was, therefore, properly dismissed as untimely unless, for one or more reasons, the bar of R.C. 2305.11(B) was ineffective to preclude suit.

The arguments advanced by appellants to demonstrate the ineffectiveness of R.C. 2305.11(B) to preclude application of the tolling statute, R.C. 2305.16, take the form of four separate challenges to the constitutionality of R.C. 2305.11(B). It is argued: (i) that the statute is too vague to meet constitutional muster; (ii) that it denies equal protection of the laws to the decedent; (iii) that, to the extent the statute is applied to bar the instant cause, it is applied retroactively in violation of the Ohio constitution; and, lastly, (iv) that it is in conflict with other Ohio statutes. These challenges to the constitutionality of the medical malpractice limitations statute are found to be without merit for the reasons set out below.

Appellants first argue that the statute is vague to the point of incomprehensibility, thus violating the constitutional principle that ordinary persons exercising common sense must be able adequately to understand its language, are given fair

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[4] On July 29, 1977, written notice was given by appellants that consideration was being given to bringing a malpractice action. This notice, an attempt to comply with the second paragraph of R.C. 2305.11 (A) in order to extend by 180 days the period in which suit must be commenced, was obviously ineffective to extend the time since it was not given "prior to the expiration of the time contained in this division."

notice of conduct proscribed, do not have to guess at its meaning, and are thus able to conform their conduct to its mandate. *United States* v. *Powell* (1975), 423 U.S. 87; *Wainwright* v. *Stone* (1973), 414 U.S. 21; *Broadrick* v. *Oklahoma* (1973), 413 U.S. 601; *Rabe* v. *Washington* (1972), 405 U.S. 313. When a legislative enactment is so "full of uncertainty and contradictions" that it is incapable of enforcement, it is "inimical to many of the plain provisions of both the State and Federal Constitutions." *State, ex rel. Millikan* v. *Cook, Clerk* (1932), 125 Ohio St. 206, 208, 180 N.E. 896, 896. However, neither the fact that the legislature might have chosen clearer and more precise language to express its intent, *United States* v. *Powell, supra* at 94, nor the wisdom of the legislation, nor its mode of expression, *State, ex rel. Clark* v. *Brown* (1965), 1 Ohio St. 2d 121, 205 N.E.2d 377, may be called into question under this doctrine. Moreover, in this aspect, as in other branches of appellants' constitutional challenge, a presumption of constitutionality attaches to the enactment in question, and it is the burden of those attacking its validity to establish a constitutional infirmity "beyond a doubt," *State* v. *Martin* (1958), 168 Ohio St. 37, 42, 151 N.E.2d 7, 11. That burden was not, we conclude, met here.

The purpose of the July 28, 1975 amendment to R.C. 2305.11, as part of the comprehensive Am. Sub. H.B. No. 682 (136 Ohio Laws 2809, 2823), is quite clear, and the language used to effectuate it is at least adequately expository. As the emergency clause of Am. Sub. H.B. No. 682 demonstrates, the legislature was concerned with the continuance of an adequate system of health care delivery to the citizens of Ohio, and with the effect thereon of, *inter alia*, mounting insurance and health care costs. *Denicola* v. *Providence Hospital* (1979), 57 Ohio St. 2d 115, 387 N.E.2d 231. The language of section (B) of R.C. 2305.11, in which appellants find the bulk of their instanced examples of vagueness, seems clearly directed to part of this problem by addressing itself to the period of exposure of physicians and others to malpractice actions. Thus, the one year limitation period for

malpractice actions embodied in the law of Ohio for many years had been extended, in effect, by decisions which date the accrual of the cause of action (and, hence, the beginning of the running of the limitation period) from the termination of the physician-patient relationship, *Wyler* v. *Tripi* (1971), 25 Ohio St. 2d 164, 267 N.E.2d 419, or, where the negligent act or omission is not readily discoverable by reasonable diligence, from the date of discovery thereof, *Melnyk* v. *Cleveland Clinic* (1972), 32 Ohio St. 2d 198, 290 N.E.2d 916. In addition, various disabilities will toll the running of the one year limitation period during the continuance of the disability. R.C. 2305.16. The result of the foregoing has been to extend, sometimes to considerable lengths, the continuous period of exposure to malpractice actions of those responsible for health care delivery.

In the instant case, as an example, the disability statute, R.C. 2305.16, prior to its limitation by Am. Sub. H.B. No. 682 in 1975, would have tolled the statutory period both during the minority of the child and, beyond that, for the period of his mental incompetence. Since the latter is asserted to have been permanent, the one year limitation period would have been inoperative during the balance of his life.[5] Am. Sub. H. B. No. 682 addressed itself to this extended period of exposure by the enactment of section (B) of R.C. 2305.11, which acomplished two results: (i) it places an overall limitation of four years "after the act or omission constituting the alleged malpractice occurs," specifically inclusive of extensions resulting from the application of the disability stat-

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[5] The policy considerations which make this sort of open-ended exposure to suit undesirable have been stated too often to require repetition. *See generally* 34 O. Jur. 2d 487, Limitation of Actions, Section 3 (1958). One of the dangers of stale actions is demonstrated by this case, where many of the medical records dealing with the birth of the infant, and his early treatment, were routinely destroyed by the hospital seven years after the event, or have disappeared, and are now unrecoverable.

ute, R.C. 2305.16, and inclusive of extensions resulting from application of the *Wyler* and *Melnyk* line of decisions, so that in no event (unless, arguably, for the 180 day extension provided in the second paragraph of section (A) under certain conditions, *see* note 6 *infra*) may a malpractice action be commenced more than four years after the acts or omissions of negligence occur, irrespective of the date the cause of action "accrues" under *Wyler* or *Melnyk* or the running of time is tolled by R.C. 2305.16; (ii) *except*, that if the injured party has not attained his tenth birthday, he shall have until his fourteenth birthday to commence the action.

So much seems to us to be clearly and unequivocally stated. More to the point, so far as appellants' argument is concerned, *it answers those questions that directly affect the appellants' case*, which are the only questions appellants may be heard to argue. We are not required to respond to hypothetical fact situations, nor to examine the constitutional sturdiness of the statute under another state of facts not involved here.[6] *DeLozier* v. *Sommer* (1974), 38 Ohio St. 2d 268, 313 N.E.2d 386; *Cincinnati* v. *Hoffman* (1972), 31 Ohio St. 2d 163, 285 N.E.2d 714; *State, ex rel. Herbert* v. *Ferguson, Auditor* (1944), 142 Ohio St. 496, 51 N.E.2d 980. In the instant case, suit was commenced well after the child's fourteenth birthday. There is no ambiguity, lack of clarity, or vagueness under this state of affairs; the instant suit was commenced beyond the limitation expressed in R.C. 2305.11(B).

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[6] Appellants raise, for example, a potentially vexacious question arising under the second paragraph of R.C. 2305.11(A), *viz.*, whether the written notice that extends by 180 days the time of commencement of suit, relates to Section (A) only, or is modified by Section (B). The appellees disagree among themselves on its interpretation. *See* Christ Hospital Brief, p. 9, *and* Fleming Brief, p. 8. Since the written notice in the instant case was not sent until well after the child's fourteenth birthday (*see* note 4 *supra*), the point is unnecessary to decide; under any possible interpretation of the language, the notice was untimely and ineffective.

The argument that the statute is void for vagueness must, therefore, fail.

Next, appellants argue that R.C. 2305.11, as amended July 28, 1975, denied to the child the equal protection of laws guaranteed by Article II, Section 26 of the Ohio Constitution, and by the Fourteenth Amendment to the United States Constitution. This argument centers itself on what is described by appellants as a wholly arbitrary and irrational categorization of minors into those who are less than ten years of age, who have until they are fourteen to commence an action, and those who are over ten but less than fourteen, who have (appellants argue) only one year to commence their actions. (Appellants' Brief at 11). There are several faults in this analysis. In the first place, while a child under ten at the time the act or omission occurs has until he is fourteen to file suit – and so far appellants are correct – a child between ten and eighteen does not have only one year, as appellants assume. Rather, the limitation period is still tolled during his minority (or other disability) purusant to R.C. 2305.16, *subject, however,* to the overall limitation of four years contained in the first sentence of R.C. 2305.-11(B). Thus, a child of ten years and one day when the act of negligence occurs would have four years to commence his action, or until he was a day older than fourteen. A child thirteen would have a similar period until he became seventeen; a child of seventeen would have the period of his disability, *i.e.*, until eighteen, and would then be required to comence the action within the regular one year period of R.C. 2305.11(A), a time frame obviously within the overall four year limitation of section B.

Secondly, whatever "arbitrariness" may appear in the working out of the various age categories, the appellants' decedent is scarcely in a position to complain, since his class (under ten years at the time of the acts or omissions of malpractice) receives the lengthiest period of grace, *viz.*, up to fourteen years. Any disadvantage arguably found in the statutory

scheme would attach to others than those in the decedent's position. In these circumstances, he is not within the class which has standing to complain. *State* v. *Burgun* (1978), 56 Ohio St. 2d 354, 365, 384 N.E.2d 255, 263.

Lastly, and in any event, we find no transgression of the Fourteenth Amendment, or of the Ohio Constitution, in the treatment accorded the various classes of minors. It is perfectly clear that the General Assembly has the constitutional authority to make classifications meeting its criteria of need, prevailing conditions, and public policy, and, so long as the classification neither interferes with a fundamental right nor operates within a suspect category, the classification need only satisfy the requirements that it further an appropriate governmental purpose, and operate equally as to all persons within the class. *Police Department of Chicago* v. *Mosley* (1972), 408 U.S. 92; *Porter* v. *Oberlin* (1965), 1 Ohio St. 2d 143, 205 N.E. 2d 363. This "rational basis" test seems to us to be satisfied by the instant legislation. The legislation operates equally as to members within the class; the subject matter of the 1975 Medical Malpractice Act, of which the instant statute was part, is a matter of legitimate governmental interest addressed to a problem seen as one of substantial importance, *Denicola* v. *Providence Hospital, supra;*[7] and the classifications established by the law do not strike us as any more irrational than many other well-established age classifications within the law.[8]

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[7] *See also Prendergast* v. *Nelson* (1977), 199 Neb. 97, 256 N.W.2d 657; *Harrison* v. *Schroder* (Tenn. 1978), 569 S.W.2d 822; *Attorney General* v. *Johnson* (1978), 282 Md. 168, 385 A.2d 57. For a discussion of the Ohio Medical Malpractice Act generally, *see* Ripps, *The Ohio Medical Malpractice Statute: An Analysis*, 4 Ohio Northern U.L. Rev. 24 (1977).

[8] As, for example, former R.C. 3109.04, allowing a child of fourteen years to choose the parent it prefers to live with, and the same statute, as amended, lowering the age of choice from fourteen to twelve years. R.C. 4707.08 places the lowest age limited for an operator's license

Finally, appellants argue that R.C. 2305.11(B) is a retroactive law violating Article II, Section 28 of the Ohio Constitution, and various statutes of the State, because it impairs or destroys a vested right, *Gregory* v. *Flowers* (1972), 32 Ohio St. 2d 48, 290 N.E.2d 181, and that R.C. 2305.11(B) unconstitutionally conflicts with other laws. Neither contention has merit. As to the first of these grounds, we think the issue of retroactivity was laid to rest by *Cook* v. *Matvejs* (1978), 56 Ohio St. 2d 234, 383 N.E.2d 601, a case where the injured party, aged seventeen on the date of the injury in 1972 and therefore under the disability of minority until 21, found the age of majority lowered to 18 after he had passed his 18th birthday. Suit was not commenced until more than two years after his 18th birthday, although within two years of his 21st birthday. Sustaining the trial court's dismissal of the action as untimely, the Supreme Court addressed the issue of putative retroactivity as follows:

> "Conceding the somewhat muddled distinction between procedural and substantive rights, this court nevertheless delineated [*i.e.*, in *Gregory, supra*] between the operation of an amended statute of limitations which *totally* obliterates an existing substantive right and one which merely shortens the period of time in which the remedy can be realized. The latter application of an amended statute is not unlawful as long as a prospective claimant or litigant, as in the cause at bar, is still afforded, " 'reasonable time in which to enforce' his right." *Flowers, supra*, at page 54, 290 N.E.2d at page 182. In addition, Justice Leach, in a concurring opinion, set forth further guidelines concerning this concept of "reasonableness" by indicating, at page 60, 290 N.E.2d at page 189, that he

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at fourteen years. *See also* R.C. 2111.12 and R.C. 2111.46, as to the guardianship of minors, similarly selecting fourteen years as an appropriate age classification. Also, as to the contributory negligence presumptions, *see Holbrock* v. *Hamilton Distributors, Inc.* (1967), 11 Ohio St. 2d 185, 228 N.E.2d 628, and *Howland* v. *Sears, Roebuck & Co.* (6th Cir. 1971), 438 F.2d 725.

> would hold "that amendatory legislation of this nature, relating to procedure, must accord a reasonable time *after the effective date* of the amendment, for the assertion of existing substantive or vested rights." [Emphasis *sic.*]

Id. at 237, 383 N.E.2d at 604. Here, as in the *Cook* case, the rights of the decedent were not totally expunged by the 1975 amendment to R.C. 2305.11, although the time in which he could exercise them was shortened substantially. Since the decedent was three days short of his 13th birthday on the effective date of the act, he had one year and three days in which to commence the action before the cut-off date provided by the amendment, his 14th birthday. The act was, therefore, clearly not retroactive in "totally obliterat[ing] an existing substantive right." *Cook, supra* at 237, 383 N.E.2d at 604.[9]

As to the conflict issue, appellants make clear neither the specific area of conflict, nor the principle of law which holds that conflicts between statutes, where they exist, are grounds for holding them unconstitutional. So far as we are aware, to be declared unconstitutional, a legislative act must violate some identifiable and particular provision of the Constitution, *Walker* v. *Cincinnati* (1871), 21 Ohio St. 14. The violation need not be prohibited by the Constitution in express words, but there must nevertheless exist a clear repugnancy, free from doubt, with a particular constitutional provision. *See generally* 16 O. Jur. 3d, Constitutional Law, Sections 123-130, 167 (1979). The specific areas of such conflict raised by

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[9] We are not called upon to decide — and do not decide — the more difficult case where the injured party is a few days short of his 14th birthday on the effective date of the act, with the act or omissions constituting malpractice having occurred four years prior thereto. It seems reasonable to assume, however, that the concurring opinion of Judge Leach in *Gregory* v. *Flowers, supra,* cited approvingly in *Cook* v. *Matvejs, supra,* would accord the injured party "a reasonable time after the effective date of the amendment, for the assertion of existing substantive or vested rights."

appellants, *viz.*, vagueness, equal protection of laws, and retroactivity, have been dealt with above and found to be without merit. What remains of appellants' argument seems a generalized conviction that the working out of R.C. 2305.11(B) results, as to appellants, in an irreparable wrong to a tragically injured child and to his parents. Our response to such arguments, however sympathetically inclined we may find ourselves, is, of course, irrelevant; it can no more affect our duty than any contrary opinion we may entertain as to the wisdom of the statute in question. The legislation challenged here was within the province and gift of the General Assembly and, finding no constitutional impediment in its exercise of authority, we overrule appellants' remaining assignment of error.

Affirmed.

BETTMAN, P. J., and KEEFE, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of release of this Decision.

APPENDIX B – ORDERS OF THE COURTS BELOW
(Including Companion Case)

APPENDIX B-1

THE SUPREME COURT OF THE STATE OF OHIO

No. 80-680

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: November 26, 1980

WILLIAM T. REMBOLD, JR., ADMR., ET AL.,
Appellants,

vs.

ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, d.b.a. THE CHRIST HOSPITAL, ET AL.,
Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 26th day of November, 1980.

THOMAS L. STARTZMAN, Clerk.
By ..... Deputy.

APPENDIX B-2

VANCE ET AL., APPELLANTS, *v.* ST. VINCENT HOSPITAL AND MEDICAL CENTER ET AL., APPELLEES.

[Cite as Vance v. St. Vincent Hospital (1980), 64 Ohio St. 2d 36.]

Malpractice—Physicians and hospitals—Statute of limitations—Applicability to minors.

A minor of 10 years of age or older must file a medical malpractice action within the time limitations set forth in R. C. 2305.11(A) and (B), notwithstanding R. C. 2305.16.

(No. 80-8—Decided November 26, 1980.)

APPEAL from the Court of Appeals for Lucas County.

On March 30, 1978, Marcella Vance and her mother, Doris Vance, appellants herein, filed an action in the Court of Common Pleas of Lucas County against St. Vincent Hospital and Medical Center (hereinafter St. Vincent Hospital) and William J. Meyer, M.D. In the first count of the complaint Marcella Vance alleged that she had been born on October 17, 1958; that during the months of April, May and June, 1976, she had been a patient of Dr. Meyer in St. Vincent Hospital; that she had sustained injuries as the direct and proximate result of the negligence of the agents and employees of the hospital, and the negligence and malpractice of Dr. Meyer; and that those injuries had aggravated and increased to the level of a permanent impairment. She further alleged that within one year after her 18th birthday she had served written notice upon the defendants that she was contemplating bringing an action against them. In the second count, Doris Vance incorporated her daughter's allegations and claimed that she had incurred medical expenses for her daughter while she was a minor and had suffered a loss of her daughter's services, all presumably as a result of the defendants' actions.

By answer, defendants admitted that Marcella Vance had been a patient of Dr. Meyer from April 2, 1976, to April 16, 1976, pursuant to staff patient assignment at the hospital; that she again had been a patient at the hospital from April 21, 1976, to June 21, 1976; that she had been born on October 17, 1958, and that within one year of her eighteenth birthday she had served written notice on them of possible litigation. The remainder of the complaint was denied. The defendants prayed that the complaint be dismissed as plaintiffs' action was barred by the medical malpractice statute of limitations (R. C. 2305.11).

Thereafter the defendants moved, pursuant to Civ. R. 56, for entry of summary judgments in their favor for the reason that the action was not filed within the limitations period.

The Court of Common Pleas held oral argument on the motion and entered judgment for the defendants. The Court of Appeals affirmed in a split decision.

The cause is before this court upon allowance of a motion to certify the record.

Messrs. Goldberg, Williams, Jilek & Lafferty and *Mr. David R. Goldberg,* for appellants.

Messrs. Shumaker, Loop & Kendrick, Mr. Robert M. Anspach, and *Mr. Dennis P. Witherell,* for appellees.

SWEENEY, J. Resolution of this cause is dependent upon interpretation of the medical malpractice statute of limitations, R. C. 2305.11, as amended in July, 1975, by Am. Sub. H. B. No. 682, and of its effect on potential malpractice plaintiffs who are minors over the age of 10.[1]

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[1] R. C. 2305.11 provides, in pertinent part:

"(A) An action for * * * malpractice, including an action for malpractice against a physician [, podiatrist,] or a hospital, * * * shall be brought within one year after the cause thereof accrued, * * *.

"If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is

The parties disagree as to the effect of that part of R. C. 2305.11(B) which reads:

"The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code * * *."[2]

Appellants argue that this language refers only to the four-year limitations period contained in the remainder of R. C. 2305.11(B). They contend that this provision has no effect on the one-year limitations period of R. C. 2305.11(A). Under their interpretation, R. C. 2305.16 continues to toll the running of the one-year limitations period until a minor reaches the age of 18. Appellants concede that pursuant to R.C. 2305.11 (B), R. C. 2305.16 could not "save" a minor's cause of action for a period longer than four years from the alleged malprac-

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presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

"(B) In no event shall any medical claim against a physician [, podiatrist,] or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician [, podiatrist,] or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital." (Contains bracketed changes as adopted by Am. H. B. No. 1426, effective July 1, 1976.)

[2] R. C. 2305.16 provides, in pertinent part:

"Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed."

tice.[3] Pursuant to appellants' argument, the cause herein was timely because it was filed within one year from Marcella Vance's eighteenth birthday and prior to the expiration of four years "after the act or omission constituting the alleged malpractice."

Conversely, appellees argue that R. C. 2305.11(B) negates in full any tolling effect of R. C. 2305.16 in medical malpractice actions and other actions asserting medical claims. They contend that the sole tolling provision for legal disabilities in medical malpractice actions is for "a minor who has not attained his tenth birthday" when the cause of action accrues, who "shall have until his fourteenth birthday in which to file an action for malpractice against a physician or a hospital." R. C. 2305.11(B). Appellees maintain that, with this sole exception, all persons are subject to identical rules for determining the timeliness of their medical malpractice actions.

Our primary purpose in interpreting a statute is to effectuate the intent of the General Assembly. *Henry* v. *Central Natl. Bank* (1968), 16 Ohio St. 2d 16; 50 Ohio Jurisprudence 2d 139, Statutes, Section 169. Legislative intent is primarily determined from the language of the statute itself. *Steward* v. *Trumbull County Bd. of Elections* (1973), 34 Ohio St. 2d 129, 130. The General Assembly must be assumed or presumed to have used the words of a statute advisedly. *Wachendorf* v. *Shaver* (1948), 149 Ohio St. 231, 236-237.

Inherent in appellants' argument is the premise that the term "section" in R. C. 2305.11(B) ("the limitations in this *section* * * * apply to all persons * * * notwithstanding section 2305.16 of the Revised Code") does not mean R. C. 2305.11

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[3] Under appellants' interpretation, a minor obtaining a cause of action in medical malpractice at the age of 10, 11, 12, 13, or 14 would have until the fourth anniversary of the date of the malpractice in which to file suit. A minor whose cause of action in malpractice accrues at the age of 15, 16, or 17, would be required to file suit on or before his 19th birthday, having become bound by the one-year limitations period of R. C. 2305.11(A) upon reaching majority.

in its entirety, but only R. C. 2305.11(B). However, a review of Am. Sub. H. B. No. 682 discloses that throughout the Act, a distinction is made between statutory "sections" and statutory "divisions," *e.g.*, R. C. 2305.11(A) ("if a written notice, prior to the expiration of time contained in this *division*, is given * * *"); R. C. 2305.27 ("in any medical claim, as defined in *division* [B] of *section* 2305.11"); and R. C. 2711.23(J) (patient's rights "under *division* [B] of this *section*").[4] Thus, had the General Assembly intended that the disputed language of R. C. 2305.11(B) have reference only to the first sentence of division (B), it would have provided, consistent with the rest of the Act, that the "limitations in this *division* * * * apply to all persons * * * notwithstanding section 2305.16 of the Revised Code," rather than providing that the "limitations in this *section* * * * apply * * *."

However, our determination concerning the use of the word "section" rather than "division" in R.C. 2305.11(B) does not conclude our inquiry into the legislative intent of the statute. R. C. 1.49, a codification of judicially formulated rules of statutory construction, provides:

"If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

"(A) The object sought to be attained;

"(B) The circumstances under which the statute was enacted;

"(C) The legislative history;

"(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

"(E) The consequences of a particular construction;

"(F) The administrative construction of the statute."

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[4] See, also, R. C. 2317.54; 2711.21(A), (D) and (E); 2711.23(B); 2743.43(B); 3929.72(A) and (B).

R. C. 2305.11(B) was enacted in July 1975 as part of Am. Sub. H. B. No. 682—legislation declared to be "an emergency measure necessary for the immediate preservation of the public peace, health, and safety" due to "the fact that immediate action is necessary to insure a continuance of health care delivery to the citizens of Ohio." *Id.*, at Section 8. The legislation was comprehensive in nature and consisted of a response to what was largely perceived throughout the country to be a medical malpractice "crisis"[5] manifested by sharply increased medical malpractice insurance premiums, cancellation of policies, and physician work slowdowns or stoppages.[6]

Prior to the adoption of Am. Sub. H. B. No. 682, R. C. 2305.11 provided simply that "[a]n action for * * * malpractice * * * shall be brought within one year after the cause thereof accrued * * * [135 Ohio Laws 982]." Since *Gillette* v. *Tucker* (1902), 67 Ohio St. 106, this court has consistently held that a cause of action in medical malpractice does not "accrue," and hence the statute of limitations does not begin to run, until the termination of the physician-patient relationship.[7] Additionally, in *Melnyk* v. *Cleveland Clinic* (1972), 32 Ohio St. 2d 198, it was held that where alleged medical malpractice consists of negligently leaving a foreign object in a patient's body, the one-year statute of limitations is tolled until the

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[5] Appellants take issue with the contention that a medical malpractice insurance "crisis" ever, in fact, existed or was justified; but they acknowledge that the impetus behind Am. Sub. H. B. No. 682 was the perception of such a crisis.

[6] See Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L. J. 1417; Notes, Ohio's Statute of Limitations for Medical Malpractice, 38 Ohio St. L. J. 125, 139; Notes, Ohio's RX for the Medical Malpractice Crisis: The Patient Pays, 45 Cincinnati L. Rev. 90.

[7] *DeLong* v. *Campbell* (1952), 157 Ohio St. 22; *Lundberg* v. *Bay View Hospital* (1963), 175 Ohio St. 133; *Wyler* v. *Tripi* (1971), 25 Ohio St. 2d 164. See, also, *Corpman* v. *Boyer* (1960), 171 Ohio St. 233.

patient discovers or, by the exercise of reasonable diligence, should have discovered the negligent act.

It can readily be seen that, prior to the adoption of R. C. 2305.11(B), a medical malpractice action could, under certain circumstances, be timely filed many years after the malpractice itself occurred, for the reason that the patient's cause of action does not necessarily accrue simultaneously with the act or omission constituting the malpractice. In the *Melnyk* case, for example, the plaintiff's action was deemed timely although filed nearly 11 years from the allegedly negligent surgery.

We do not believe the purpose of the General Assembly in adopting R. C. 2305.11(B) while leaving R. C. 2305.11(A) virtually unchanged was to alter this court's prior interpretations of the medical malpractice statute of limitations, but rather was to establish, as a rule of general applicability, a maximum period of four years from the alleged malpractice itself within which a potential plaintiff must bring his action irrespective of the date on which his cause of action accrues.[8] The purpose of the second sentence of R. C. 2305.11(B) was to totally negate any tolling effect of R. C. 2305.16 in medical malpractice cases. The General Assembly intended to mitigate the harshness of its decision to remove the legal disability of minority in medical malpractice actions only to the extent that minors under the age of 10 be permitted to bring suit longer than one year from the accrual of the cause of action and four years from the date of the malpractice, the sole time limitation for such plaintiffs being their fourteenth birthday.

We may not question the wisdom of this legislation. Unless a statute is constitutionally deficient this court must uphold it.

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[8] Appellants argue, in effect, that this construction of R. C. 2305.11 may have the result of barring a patient's cause of action prior to its accrual (*e.g.*, where the doctor-patient relationship extends beyond a four-year period from the alleged malpractice). This cause does not present such a factual situation. We express no opinion as to the constitutionality of R. C. 2305.11 when applied in such a manner.

Ohio Mathieson Chemical Corp. v. *Ontario Store* (1967), 9 Ohio St. 2d 67, 70. Having interpreted R. C. 2305.11 concordant with what we firmly believe to be the intent of the General Assembly, we find that the constitutionality of the statute, not being an issue raised in the lower courts, is not before us. *Republic Steel Corp.* v. *Bd. of Revision* (1963), 175 Ohio St. 179; *Szymanski* v. *Halle's* (1980), 63 Ohio St. 2d 195, 198-199.

Unrefuted affidavits filed in this cause on behalf of the appellees' motion for summary judgment show that Marcella Vance ceased being Dr. Meyer's patient on April 16, 1976, and the hospital's patient on June 21, 1976. She was on each of those dates over the age of 10 and subject to the one-year limitations period of R. C. 2305.11. However, neither Marcella Vance nor her mother filed suit or served notice on the respective appellees of their intent to commence litigation until October of 1977. The medical claims asserted in this action are thus barred by the statute of limitations.[9]

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., W. BROWN, P. BROWN, LOCHER, HOLMES and DOWD, JJ., concur.

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[9] For the first time in supplemental brief filed after the oral argument of this cause, appellants argue that Doris Vance's claim is not subject to the one-year limitation of R. C. 2305.11, but rather the four-year limitation of R. C. 2305.09(D). Throughout this litigation appellants have not disputed appellees' contention that R. C. 2305.11 is dispositive of both plaintiffs' claims, but conversely have argued that the mother's claim rises and falls with the daughter's. "Issues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on review." *Republic Steel Corp.* v. *Bd. of Revision, supra.* See, also, 5 Ohio Jurisprudence 3d 68, Appellate Review, Section 516.

APPENDIX B-3

THE SUPREME COURT OF THE STATE OF OHIO

No. 80-680

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: July 30, 1980

William T. Rembold, Jr., Admr., et al.,

Appellants,

vs.

The Elizabeth Gamble Deaconess Home Association, dba The Christ Hospital, et al.,

Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 30th day of July, 1980.

THOMAS L. STARTZMAN, Clerk.
By .....Deputy.

APPENDIX B-4

THE SUPREME COURT OF OHIO

No. 80-680

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: June 27, 1980

William T. Rembold, Jr., Admr., et al.,
Appellants,

vs.

The Elizabeth Gamble Deaconess Home Association,
d.b.a The Christ Hospital, et al.,
Appellees.

ORDER DISMISSING APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX B-5

THE SUPREME COURT OF OHIO

No. 80-680

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: June 27, 1980

William T. Rembold, Jr., Admr., et al.,
Appellants,

vs.

The Elizabeth Gamble Deaconess Home Association,
dba The Christ Hospital, et al.,
Appellees.

ENTRY OF SUPREME COURT OF OHIO DENYING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Hamilton County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by James R. Horthe

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX B-6

THE SUPREME COURT OF OHIO

Case No. 80-8

Marcella Vance et al.,

Appellants,

vs.

St. Vincent's Hospital et al.,

Appellees.

ENTRY

May 9, 1980

On written request and for good cause shown, it is ordered that Frank C. Woodside, III and Jane M. Grote be given leave to file brief amicus curiae on behalf of Children's Hospital Medical Center et al. on or before May 19, 1980.

/s/ FRANK D. CELEBREZZE
Chief Justice Judge

APPENDIX B-7

THE SUPREME COURT OF OHIO

Case No. 80-8

Marcella Vance et al.,

Appellants,

vs.

St. Vincent's Hospital et al.,

Appellees.

ENTRY

May 9, 1980

On written request and for good cause shown, it is ordered that Jason A. Blue and Dennis M. McCarthy be given leave to file brief amicus curiae on behalf of Ohio Academy of Trial Lawyers on or before May 14, 1980.

/s/ FRANK D. CELEBREZZE
Chief Justice Judge

APPENDIX B-8

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
First Appellate District
Hamilton County, Ohio

CASE NO. 80-680

WILLIAM T. REMBOLD, JR., et al.,
Plaintiffs-Appellants,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION dba THE CHRIST HOSPITAL, et al.,
Defendants-Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION

(Filed May 9, 1980)

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Propositions of Law:

1. § 2305.11 OF THE OHIO REVISED CODE AS AMENDED (JULY 28, 1975) IS UNCONSTITUTIONALLY VAGUE AND A DENIAL OF EQUAL PROTECTION IN ITS SUGGESTED APPLICATION OF STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CASES INVOLVING MINOR PLAINTIFFS. 4-17

2. § 2305.11 OF THE OHIO REVISED CODE (STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CASES) TOLLS UNTIL SUCH TIME AS A MINOR PLAINTIFF HAS REACHED THE AGE OF MAJORITY. THE AGE OF MAJORITY IN OHIO IS EIGHTEEN, AND ANY INTERPRETATION OF § 2305.11 WHICH SUGGESTS OTHERWISE IS CONTRARY TO ACCEPTED RULES OF STATUTORY INTERPRETATION AND IS UNCONSTITUTIONAL. 5-17

• • •

3. § 2305.16 OF THE OHIO REVISED CODE AND THE JOINDER REQUIREMENTS OF RULE 19.1 OF THE OHIO RULES OF CIVIL PROCEDURE TOLLS THE PARENTS' CAUSE OF ACTION WHEN THE INTEREST OF THE PARENTS AND THE INCOMPETENT MINOR ARE JOINT AND INSEPARABLE. 17-19

• • •

A CASE OF SUBSTANTIAL CONSTITUTIONAL QUESTION THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST 20

• • •

[AUTHORITIES AND MEMORANDUM OMITTED]

APPENDIX B-9

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHO

NO. C-790011

SCOTT KENDALL REMBOLD, a minor by his parents and next friend, WILLIAM THEODORE REMBOLD, JR., WILLIAM THEODORE REMBOLD, JR. and NANCY CAROL (LIND) REMBOLD,

Plaintiffs-Appellants,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, d/b/a THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE and JANE DOE,

Defendants-Appellees.

NOTICE OF APPEAL

(Filed April 10, 1980)

Come now the Plaintiffs-Appellants and the now substituted Administrator of the estate of Scott Kendall Rembold, and gives notice of appeal to the Supreme Court of Ohio, from the opinion and journal entry entered in this action by the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, on the 19th day of March, 1980.

Further, Plaintiffs-Appellants state this case involves sub-

stantial constitutional questions and matters of public and great general interest.

/s/ MARLENE PENNY MANES
Attorney for Plaintiffs-Appellants
914 Main Street
Cincinnati, Ohio 45202
721-5018

/s/ JAMES R. HARTKE
Attorney for Plaintiffs-Appellants
914 Main Street
Cincinnati, Ohio 45202 (621-4421)

[CERTIFICATION OMITTED]

APPENDIX B-10

THE SUPREME COURT OF THE STATE OF OHIO

No. 80-8

THE STATE OF OHIO,) 1980 TERM
City of Columbus.) To wit: February 22, 1980

Marcella Vance, et al.,

Appellants,

vs.

St. Vincent Hospital and Medical Center et al.,

Appellees.

ORDER DIRECTING
THE COURT OF APPEALS
for Lucas County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 22nd day of February 1980

THOMAS L. STARTZMAN, Clerk

/s/ SAM F. GASKINS, Deputy

APPENDIX B-11

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

CASE NO. C 790011

WILLIAM T. REMBOLD, JR., et al.

Plaintiffs,

vs.

THE ELIZABEATH GAMBLE DEACONESS HOME ASSOCIATION dba THE CHRIST HOSPITAL, et al.,

Defendants.

APPEAL FROM THE CIVIL DIVISION OF THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

(Filed June 29, 1979)

PLAINTIFF-APPELLANTS ASSIGNMENTS OF ERROR AND BRIEF

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AND
ASSIGNMENTS OF ERROR

• • •

FIRST ASSIGNMENT OF ERROR 4

The Common Pleas Court erred to the prejudice of the Plaintiffs-Appellants in holding that their cause of action was not timely brought pursuant to the Ohio Rev. Code Section 2305.11.

Issue Presented for Review and Argument 4

1. The application of Ohio Rev. Code Section 2305.11 as amended July 28, 1975 to this case is unconstitutional for the following reasons; A) The Statute is vague. B) It is denial of equal protection. C) Its application in this matter is retroactive and therefore is in violation of the Ohio Constitution. D) Its application in this matter is in conflict with other Ohio Statutes.

• • •

SECOND ASSIGNMENT OF ERROR 13

The Common Pleas Court erred to the prejudice of the Plaintiffs in holding that the parents cause of action in this matter was barred by 2305.09 of the Ohio Revised Code.

Issue Presented for Review and Argument 14

1. Application of 2305.09 in this matter as a bar to the parents cause of action is in direct violation with the Savings clause contained in 2305.16 of the Ohio Revised Code.

• • •

[AUTHORITIES AND BRIEF OMITTED]

APPENDIX B-12

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-7800671

WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, Deceased, Minor, WILLIAM T. REMBOLD, JR. and NANCY CAROL (LIND) REMBOLD,

Plaintiffs,

vs.

THE ELIZABEATH GAMBLE DEACONESS HOME ASSOCIATION, d/b/a THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Defendants.

NOTICE OF APPEAL

(Filed June 15, 1979)

Notice is given that Plaintiffs appeal to the Court of Appeals of Hamilton County, Ohio, First Appellate District, from the final orders entered in this action in favor of The Elizabeth Gamble Deaconess Home Association, d/b/a The Christ Hospital, and John G. Fleming, M.D., on December 8, 1978,

which were made final appealable orders Nunc Pro Tunc on January 4, 1979.

/s/ MARLENE PENNY MANES
914 Main Street
Cincinnati, Ohio 45202
Telephone: 721-5018

/s/ JAMES R. HARTKE
914 Main Street
Cincinnati, Ohio 45202
Telephone: 621-4421

Attorneys for Plaintiffs

[PRAECIPE AND PROOF OF SERVICE OMITTED]

APPENDIX B-13

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-7800671

SCOTT KENDALL REMBOLD, a Minor, et al.,

Plaintiffs,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, d/b/a THE CHRIST HOSPITAL, et al.,

Defendants.

ORDER FOR SUBSTITUTION OF PLAINTIFF'S REPRESENTATIVE

(Entered January 5, 1979)

On Motion, by agreement of counsel and it thus appearing to the Court that Scott Kendall Rembold died intestate on August 30, 1978; that the claim asserted by him was not thereby extinguished; and that William T. Rembold, Jr. has been appointed Administrator of the Estate of Scott Kendall Rembold, deceased, and has qualified and is acting as such; IT IS ORDERED that William T. Rembold, Jr., Administrator of the Estate of Scott Kendall Rembold, deceased, be substituted as Plaintiff in place of Scott Kendall Rembold, deceased, without prejudice to any proceeding had in this action, and that William T. Rembold, Jr., Administrator of the Estate of Scott Kendall Rembold, deceased, be substituted for Scott Kendall Rembold in this action from this time forward.

IT IS FURTHER THE ORDER OF THE COURT and stipulated by counsel, that this Order For Substitution and proceedings has complied with the requirements of Civil Rule 25(A)(1).

/s/ NURRE, J. for WOOD, J.

.....

JUDGE

APPENDIX B-14

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No.: A-7800671

SCOTT KENDALL REMBOLD, a minor by his parents and next friend, WILLIAM THEODORE REMBOLD, JR., WILLIAM THEODORE REMBOLD, JR. and NANCY CAROL (LIND) REMBOLD,

Plaintiffs,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, dba THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Defendants.

JUDGMENT ENTRY

(Entered December 8, 1978)

This matter came on for hearing on defendant's, John G. Fleming, M.D., Motion to Dismiss the within action in that it fails to state a claim upon which relief can be granted.

The court, having reviewed the Memoranda filed by counsel, having heard oral argument presented by counsel, and upon consideration finds:

1. That the claim contained in Count One brought by Scott Kendall Rembold, a minor by his parents and next friend, William Theodore Rembold, Jr. has not been timely brought pursuant to Ohio Revised Code Section 2305.11 and recovery is thereby barred.

2. That the claim contained in Count Two brought by William Theodore Rembold, Jr. and Nancy Carol (Lind) Rembold has not been timely brought pursuant to Ohio Revised Code Section 2305.09 and is not saved by Ohio Revised Code Section 2305.16 and recovery therefore is barred.

It is, therefore, ORDERED, ADJUDGED, AND DECREED that the within action fails to state a claim upon which relief can be granted as to defendant, John G. Fleming, M.D., and should be and it is hereby dismissed, all to which Plaintiffs except.

.....

Robert V. Wood, Judge

/s/ JAMES R. HARTKE
Attorney for Plaintiffs
914 Main Street
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/s/ DOUGLAS E. KING
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OF COUNSEL:
McCASLIN, IMBUS & McCASLIN

/s/ F. BROCKMEIER
Attorney for Defendant,
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(513) 621-6251

OF COUNSEL:
RENDIGS, FRY, KIELY & DENNIS

FB/cmm
10/25/78
182-240
1 & 5
Wood, J.

APPENDIX C – JUDGMENT FROM WHICH APPEAL IS TAKEN

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-790011

SCOTT KENDALL REMBOLD, a minor by his parents and next friend, WILLIAM THEODORE REMBOLD, JR., WILLIAM THEODORE REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Appellants,

vs.

THE ELIZABEATH GAMBLE DEACONESS HOME ASSOCIATION, d/b/a THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Appellees.

JUDGMENT ENTRY

(Entered March 19, 1980)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by their counsel, except.

[ACCOMPANYING OPINION FOUND AT PAGE APPENDIX 1A]

APPENDIX D – NOTICE OF APPEAL TO SUPREME COURT OF UNITED STATES AND EXTENSION ORDER

APPENDIX D-1

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

CASE NO. C-790011

WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, deceased minor and WILLIAM T. REMBOLD, JR. and NANCY CAROL (LIND) REMBOLD,

Plaintiffs,

vs.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION dba THE CHRIST HOSPITAL and JOHN G. FLEMING, M.D. and DR. MUST and JOHN DOE and JANE DOE,

Defendants.

NOTICE OF APPEAL

(Filed October 14, 1980)

Comes now the Plaintiffs-Appellants and gives notice of appeal to the Supreme Court of the United States from the judgment entry with accompanying opinion entered in this action by the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, on the 19th day of March,

1980. Said appeal is being taken pursuant to 28 U.S.C. § 1257 (2) (3) and the 5th and 14th Amendments of the United States Constitution, as this appeal questions the validity and/or constitutionality of Ohio Revised Code § 2305.11, as amended July 28, 1975, as it applies to minors and/or incompetents, and their parents and/or guardians.

/s/ MARLENE PENNY MANES
Attorney for Plaintiffs
914 Main Street
Cincinnati, Ohio 45202
721-5018

/s/ JAMES R. HARTKE
Attorney for Plaintiffs
914 Main Street
Cincinnati, Ohio 45202
621-4421

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX D-2

SUPREME COURT OF THE UNITED STATES

No. A-330

WILLIAM T. REMBOLD, JR., ETC., ET AL.,

Applicants,

v.

ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, ETC., ET AL.,

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari and/or for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including December 27, 1980.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 17th day of October, 1980

APPENDIX E – STATUTES

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OHIO

Art. I . . .

§ 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they

have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. (See Const 1802, Art VIII, § 1.)

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, persons, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Art. II . . .

§ 26 What laws to have a uniform operation.

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

§ 28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Art. IV . . .

§ 2 The supreme court.

(A) . . .

(B)(2) The supreme court shall have appellate jurisdiction as follows: . . .

(a) In appeals from the courts of appeals as a matter of right in the following:

. . . (iii) Cases involving questions arising under the constitution of the United States or of this state.

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals; . . .

OHIO REVISED CODE

§ 3109.01 Age of majority.

All persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes.

§ 2305.16 Disabilities; tolling of statute of limitations.

Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed. *When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.*

After the cause of action accrues, if the person entitled to bring such action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders him of unsound mind, the time during which he is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought. Eff 10-30-65. (emphasis added)

CURRENT OHIO REVISED CODE § 2305.11
(Effective July 28, 1975)

§ 2305.11 [Time limitations for bringing certain actions; definitions.]

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, *or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital,* or upon a statute for a penalty or forfeiture, shall be *brought within one year after the cause thereof accrued,* provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) *In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of* legal disability and notwithstanding section 2305.16 of the Revised Code, *provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.*

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board. (emphasis added)

FORMER OHIO REVISED CODE
(From October 1, 1953 to July 28, 1975)

§ 2305.11 Time limitations for bringing certain actions. (GC § 11225)

An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

OHIO REVISED CODE

§ 1.11 Liberal construction of remedial laws. (GC § 10214)

Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature.

§ 1.47 Intentions in the enactment of statutes.

In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

HISTORY: 134 v H 607. Eff 1-3-72.

§ 1.48 Statute presumed prospective.

A statute is presumed to be prospective in its operation unless expressly made retrospective.

§ 1.49 [Court considerations as a legislative intent.]

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

§ 1.58 [Effect of reenactment, amendment, or repeal.]

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

OHIO RULES OF CIVIL PROCEDURE

RULE 17. Parties plaintiff and defendant; capacity

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(B) Minors or incompetent persons. Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. Subject to subdivision (C) of this rule, if a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or defend by a guardian ad litem. When

a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or make such other order as it deems proper for the protection of such minor or incompetent person.

Rule 19.1

COMPULSORY JOINDER

(A) Persons to be joined. A person who is subject to service of process shall be joined as a party in the action, except as provided in subdivision (B) hereof, if he has an interest in or a claim arising out of the following situations:

. . . (3) Personal injury or property damage to a minor and a claim of the parent or guardian of the minor for loss of services or expenses or property damage if caused by the same wrongful act;

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